Nos. 480-481

FILED
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HAROLD B. WILLEY,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

FLORIDA CITRUS COMMISSION, *et al.*, *Appellants*,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *et al.*

SECRETARY OF AGRICULTURE OF THE UNITED STATES, *Appellant*,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *et al.*

On Appeal From the United States District Court for the Southern District of Florida.

BRIEF OF APPELLANTS, OTHER THAN THE SECRETARY OF AGRICULTURE, IN OPPOSITION TO MOTIONS TO AFFIRM FILED BY INTERSTATE COMMERCE COMMISSION AND OTHER APPELLEES.

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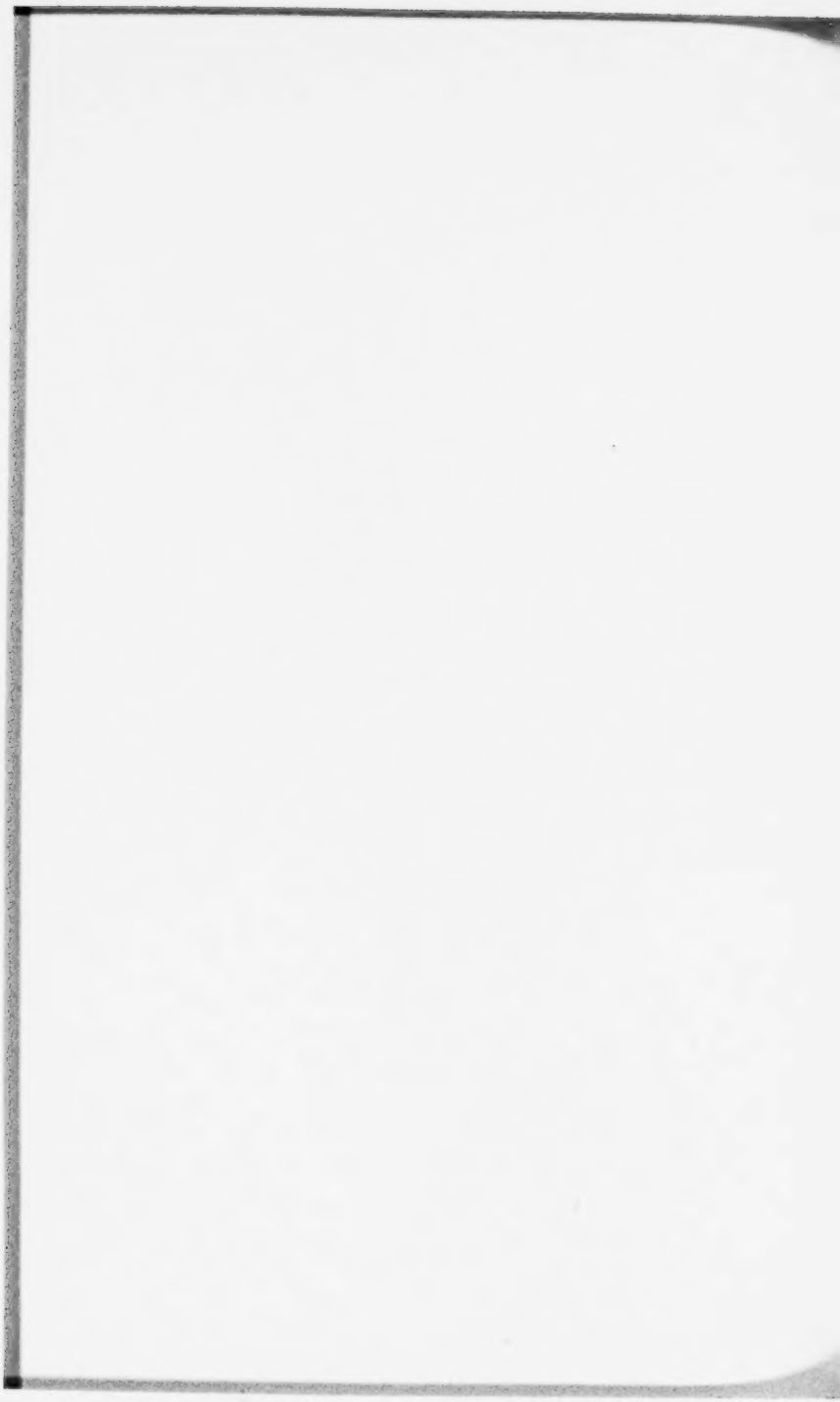

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BRIEF.

Preliminary Statement.

This is a reply under authority of Rule 7 (3) to a motion to affirm filed by appellee, Interstate Commerce Commission, received November 12, 1953, and to a similar motion to affirm filed by appellees, intervening defendants below,

The Baltimore & Ohio Railroad Company, Erie Railroad, The New York Central Railroad Company, The Pennsylvania Railroad Company, and Reading Company, also received November 12, 1953.

The motions and Jurisdictional Statements describe the proceedings in the court below and before the Interstate Commerce Commission. The report of the Commission under review is entitled *Unloading Charges on Fresh Fruits and Vegetables at New York and Philadelphia*, 286 I. C. C. 119.* The decision of the District Court below is reproduced as Appendix B of the Appellants' Jurisdictional Statement (*Florida Citrus Commission, et al.* v. *United States of America, et al.*, 114 F. Supp. 420).

Statement of Additional Facts.

The motions do not adequately state the facts involved. Important additional facts are, as recited in the Commission's reports, as follows:

For over 50 years, since "the latter part of the nineteenth century," the railroads serving New York, N. Y., "have concentrated their [fresh] fruit and vegetable deliveries" at pier stations voluntarily established and maintained by them on Manhattan Island. (286 I. C. C., p. 122) "A witness on behalf of the Erie stated that pier-station delivery on Manhattan Island is the most efficient method which that carrier has been able to organize. So efficient is the operation that the Erie has handled in 1 day, at piers 20 and 21, as many as 367 cars of fruits and vegetables." (286 I. C. C., p. 126) The Commission found: "The most economical plan of terminal handling of fruits and vegetables at New York is the unloading of the car from the car float, as at the present time, to the pier platform, for delivery to the consignee." (286 I. C. C., p. 130) "The record indicates that the unloading [by the railroads at the piers] is performed with a high degree of efficiency and with the utmost dispatch. In no other manner could these com-

* There was a prior report of the Commission, 272 I. C. C. 648.

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modities be unloaded and delivered to consignees in the short space of time available." (286 I. C. C., p. 124)

The railroads do not provide, and it is not now possible without the expenditure of approximately $24,000,000 for them to provide, team tracks (conventionally used for the delivery of carload freight) for delivery of the enormous volume of fresh fruits and vegetables consigned for delivery on Manhattan. Over 100,000 carloads are handled annually to the New York area (286 I. C. C., p. 125) and approximately 75 percent are delivered at the Manhattan pier stations. (286 I. C. C., p. 122) The existing team tracks on Manhattan are "heavily used for non-perishable freight." (286 I. C. C., p. 124) "The record established, however, that only a relatively small part of the local volume of such [fruit and vegetable] traffic can be accommodated on the existing team tracks in Manhattan." (286 I. C. C., p. 131) "On the record in this proceeding it is apparent that pier-station deliveries in Manhattan are accomplished by respondents handling the great bulk of the traffic at costs that are, in the aggregate, somewhat less than the protestants' estimated costs that would be incurred by respondents for expanded team-track deliveries, and that the 'difference in costs resulting from the fact that pier delivery does not require any investment in team-track facilities' disfavors the investment that would be required for team-track facilities sufficiently expanded to accommodate traffic now moving over the piers, even without giving consideration to the additional costs, incident to operation of such expanded facilities." (286 I. C. C., p. 133)

The unloading of the cars of fruits and vegetables at the pier stations is performed by the railroads prior to delivery of the freight to the consignees and the unloading by the railroads is essential in order that they may make the freight accessible to the consignee and accomplish delivery. "There are no physical means by which consignees' trucks can reach the car floats. Consignees have, however, access to the cars on the car float for the purposes of inspection,

but they are not permitted to take delivery of their freight from that facility. The pier floor is the first place where, after the freight has been unloaded, delivery can be taken." (286 I. C. C., p. 125) "Delivery to the consignee is not effected until after the cars are unloaded and the lading placed at a convenient location on the pier floor." (272 I. C. C., pp. 654-655) "After the vegetables are placed on the pier platform they are accessible to the consignee, and when he signs for them, he is permitted to take them away." (286 I. C. C., p. 127) "Respondents do not accord the consignees the option of performing the unloading. Under their proposal the line-haul rate will apply only to the New York piers, with an additional charge for unloading the freight and placing it on the pier platform where the consignee can accept delivery." (286 I. C. C., p. 123) The railroad proposal is to assess "a charge, in addition to the line-haul rate, for making delivery at New York piers." (286 I. C. C. 129)

The line-haul rates of the railroads have always covered the delivery of the fruit and vegetable traffic to consignees at the Manhattan pier stations, including the unloading of cars in connection therewith, and no charge in addition to the line-haul rates was made therefor until November 1, 1948, following the Commission's original decision herein authorizing such charges. "No charges such as those under consideration have applied on this traffic in the past." (286 I. C. C., p. 120) "Various rate statements and other evidence concerning the history of the respective rate adjustments indicate that terminal service, including unloading, could not have been ignored in determining line-haul rates." (272 I. C. C., p. 662)

The line-haul rates of the railroads to New York, N. Y., have always covered, and continue to cover today, delivery of all other kinds of freight to consignees at the Manhattan pier stations, including the unloading of cars in connection therewith, without separate or additional charge. "At the present time, these carriers utilize approximately 35 city-

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owned piers for the handling of freight of all descriptions. As regards the movement of freight, other than fruits and vegetables, by car float to the New York piers, and the unloading of such freight to the pier platform, the operation is identical with the manner in which fruits and vegetables are carfloated and unloaded." (286 I. C. C., p. 123) "The piers at which the assailed unloading charges on fruits and vegetables apply are open generally for the receipt and delivery of carload freight in packages. All such freight is unloaded from or loaded into cars on car floats. Freight of all kinds may be shipped from and to these piers, except that the Pennsylvania produce terminal (piers 27 and 28) is limited to the receipt and delivery of perishable freight. But even these piers, in addition to the handling of fruits and vegetables, are open to the handling of butter, butter substitutes, cheese, eggs, dressed poultry, fresh meats, fish, oysters, flower bulbs, and raw silk. All freight, other than fruits and vegetables, is unloaded by the rail carriers at their pier stations without charge therefor in addition to the line-haul rates." (286 I. C. C., p. 125)

The Questions Presented Are Substantial.

The motions to affirm are not sustainable unless it be shown, as provided in par. 4 of Rule 7, that "the questions on which decision of the cause depends are so unsubstantial as not to need further argument."

The decision of the court below sustaining the assailed orders of the Commission was rendered by two judges (Circuit Judge Louie W. Strum and District Judge William J. Barker) with one judge dissenting (District Judge Dozier A. DeVane) because in his opinion the Commission's orders were invalid and should be set aside.

The Commission found decision of the matter attended with unusual legal difficulty. It issued two reports and reached substantially different decisions in each, and advanced different reasons and grounds of decision in each. The second report, following two further hearings, states

the reasons and grounds for the Commission's final decision under the heading "General discussion and conclusions." (286 I. C. C., pp. 139-142) In this statement the Commission does not adopt or repeat certain of the principal grounds advanced in the original decision (272 I. C. C., at pages 662-663) but abandons them and plainly states in its final report the only grounds of that final decision. In fact, the original report and order thereunder were superseded and cancelled, and some of the grounds originally advanced were flatly reversed in the final report, such as the views as to the weight to be given the benefit derived by the railroads from the concentration of the traffic at the pier stations and as to the effect of the charges on the volume of traffic. The special attention of the Court is called to the fact that the motions to affirm place primary reliance upon grounds of decision quoted from the Commission's first report (notably from page 662 thereof) which were abandoned by the Commission in reaching its final decision. A similar error is found in the opinion of the majority of the court below. In its last report (286 I. C. C. 119, at page 142) the Commission specifically found that "the schedules naming the assailed unloading charges " (approved in the first report, 272 I. C. C. 648) "will be ordered cancelled" and that "the ultimate finding in the prior report is modified accordingly."

The Commission's first report, approving the full amount of the extra charges proposed by the railroads, was concurred in by six commissioners, with four commissioners dissenting, and one not participating. (272 I. C. C. 648, p. 663) In the second report the charges approved by the majority in the first report were found "not shown to be just and reasonable" and such charges were ordered cancelled (286 I. C. C., p. 142); but the Commission authorized lowered extra charges because of the majority view that "the cost of unloading should be borne partly by the shippers and partly by the respondents." (296 I. C. C., p. 140) The second report was reached, after two oral arguments,

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with one commissioner dissenting, one not participating, and with three commissioners joining in a special concurrence that they fully agreed "with this report to the extent that it reverses the prior report," from which they had dissented, and stating further that they "go along" with "the additional ultimate findings in this present report only because they afford some immediate relief to shippers in that unloading charges here approved are substantially lower than the proposed charges which have been applied on this traffic since November 1, 1948, pursuant to the findings in the prior report." (286 I. C. C., p. 142)

After the first further hearing the two hearing examiners had recommended that the extra charges in addition to the line-haul rates be found to be unjust and unreasonable in their entirety. The same conclusion was recommended by the examiner after the second further hearing. The difference between the conclusions of the examiners and the conclusion of the majority of the Commission is not a matter of fact but one of law.* This is stated by Commissioner Knudson in his dissent to the final report:

> "In my opinion, the report of the majority is not based upon the provisions of the Interstate Commerce Act, which it is the duty of this Commission to administer and enforce. The facts in this proceeding are clear. They were fully stated in the reports of the examiners and have been reproduced almost verbatim in the majority report. Instead, however, of applying the law to those facts the majority, in my opinion, has resorted to expediency and compromise." (286 I. C. C., pp. 142-143)

This appeal presents substantial questions of general and fundamental importance in the administration of the Interstate Commerce Act. The importance of this particular case can not be questioned. The charges originally approved by the Commission placed an additional burden of

* The reports of of the examiners are appended to the complaint as Appendix H and Appendix I.

approximately $2,000,000 a year on producers, shippers and receivers of fresh fruits and vegetables as to New York alone. (286 I. C. C., p. 129) At the lowered charges finally authorized, this additional burden is well in excess of $1,000,000 annually. The additional burden on shipments to Philadelphia amounts to several hundred thousand dollars annually. (286 I. C. C., p. 137)

A number of fundamentally important questions of law are presented by the appeal,* among the more important of which are the following:

1. May the Commission disregard the universal obligation of the railroads under their line-haul rates to make delivery of freight to consignees and in disregard thereof authorize an extra charge in addition to the line-haul rates for such delivery without having determined or found that the line-haul rates (a) do not include delivery or (b) are inadequate to compensate the railroads for performing their customary obligation?

2. Where the railroads have chosen not to provide team-track terminal facilities, which are customarily provided as public terminals for the delivery of carload freight, but have chosen in lieu thereof to employ pier stations, are the railroads discharged from their obligation to make delivery under their line-haul rates?

3. Where the railroads have for more than 50 years made delivery of fruit and vegetable traffic at their pier stations in New York under their line-haul rates (including performance of unloading of cars which is essential to make the freight accessible to consignees and accomplish delivery), is the Commission not duty-bound by the provisions of Section 15(7) of the Interstate Commerce Act to require railroads proposing an additional charge for delivery to sustain "the burden of proof" of showing that their line-haul rates (a)

* As indicated in the Assignment of Errors accompanying the appeal.

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do not cover delivery or (b) are inadequate to cover such service; and in the absence of such a showing, and Commission findings that such showing has been made, is the Commission not required to find the additional charge unjustified and order it cancelled?

4. Was the Commission's action arbitrary in authorizing a charge in addition to the line-haul rates for the delivery of fruit and vegetable traffic at the railroad pier stations when the railroads make delivery of all other kinds of carload freight at these stations at their line-haul rates without extra charge, the Commission having found that the physical method of handling, including unloading of cars, is identical as to all traffic?

5. Did the Commission act arbitrarily and contrary to the Interstate Commerce Act in authorizing unloading charges at New York and Philadelphia on fruits and vegetables in addition to the line-haul rates, when no such charges are assessed at any other point except where the consignee elects to request carrier unloading as a special additional service beyond delivery?

ARGUMENT.

Under American custom and practice it has long been established as a matter of law that the line-haul rates of the railroads include delivery of the freight to the consignee. This was succinctly stated by this Court in *United States* v. *American S. & T. Plate Co.*, 301 U. S. 402, at p. 409, as follows:

> "It is conceded that the line-haul rate covers delivery. Such rates are usually made to or from an area, sometimes designated a 'switching district' or 'switching limits.' Within that area the carrier holds itself out as agreeing to deliver freight in its freight depot or at team tracks or on sidings or spur-tracks owned by an industry."

This fundamental rule of law was stated in historical terms by the Commission in *Associated Jobbers of Los Angeles* v. *A., T. & S. F. Ry. Co.*, 18 I.C.C. 310, at p. 314, in the following language:

> "The American railroad rate has always been recognized as covering the full service which the carrier gives—in furnishing the car, a proper place at which to load it, the conveyance of that loaded car, and its terminal delivery."

In *Interstate Com. Com.* v. *Atchison, T. & S. F. Ry. Co.*, 234 U. S. 294, the Commission's ruling in the cited case was approved. In the present case the Commission disregarded this fundamental rule of law and authorized the railroads to make an extra charge in addition to the line-haul rates for the making of delivery without making the essential determinations which are a prerequisite to any such additional charge, namely, that the particular line-haul rates involved (a) do not cover delivery or (b) that the line-haul rates are inadequate to compensate the railroads for the delivery service. The Commission considered the so-called unloading charge without regard to the fact that it is a charge for a service which is, as shown by the Commission's own findings, no more than an essential part of the delivery service, universally a service compensated for by the line-haul rates and for over 50 years covered by the particular line-haul rates here involved. The Commission's final report (286 I. C. C. 119) and particularly the section thereof headed "General discussion and conclusions," in which the Commission fully and plainly states the reasons for its final decision, will be read in vain for any determination or finding that the unloading service is a service in addition to, or outside of, the delivery service which the railroads are obligated to perform under their line-haul rates. On the contrary, the Commission's findings make plain that the charges under consideration are "for making delivery" (286 I. C. C., p. 129) and that delivery of the traffic at the pier stations cannot be accomplished by the railroads without unloading of the cars

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by the railroads. (286 I. C. C., pp. 123, 125, 127; 272 I. C. C., pp. 654-655) The Commission's report makes clear that the charge involved is in reality not a charge for unloading but *a charge for delivery.**

The case of the shippers and receivers of the fruit and vegetable traffic rests on the simple and self-evident proposition that the railroads *should not be permitted to charge twice for the same service.* The Commission, in failing to determine the scope of the line-haul rates or their adequacy to compensate the railroads for the delivery service involved, has failed to make the inquiry essential to prevent the railroads from making a duplicate charge for a service already fully paid for in the line-haul rates.

What we do find in the "General discussion and conclusions" (286 I. C. C., pp. 139-142) is that it is not considered feasible for the railroads to provide at New York team-track terminal facilities, which are customarily provided as public terminals for the delivery of carload freight, and that the use of pier stations for the handling of such traffic "is of benefit to both shippers (including consignees) and carriers." The Commission then concludes "that the cost of unloading should be borne partly by the shippers and partly by the respondents." (pp. 139-140) The use of all transportation and terminal facilities is of benefit to both shippers and carriers. The shipper gets his goods transported to the place desired and the carriers benefit from the patronage of their facilities. The question here is not whether the shippers benefit from the use of the pier stations for the delivery of their freight but whether they have paid, and are paying, for such use and for such delivery in the line-haul rates. If the line-haul rates fully compensate the railroads for such use and for such delivery, the rail-

* "Under their proposal the line-haul rate will apply only to the New York piers, with an additional charge for unloading the freight and placing it on the pier floor where the consignees can accept delivery." (286 I. C. C., p. 123) "Respondents' proposal would, however, tend to split the New York metropolitan area by making delivery without extra charge therefor at team tracks on the New Jersey side of the Hudson River while assessing a charge, in addition to the line-haul rate, for making delivery at New York piers." (286 I. C. C., p. 129)

roads are not entitled to an extra and duplicate charge however beneficial pier station delivery may be to the shipper.

The Commission's discussion concerning the evidence as to team tracks on Manhattan, appearing in the second paragraph of its "General discussion and conclusions" (286 I. C. C., p. 140), plainly discloses the fundamental error of the Commission in failing to recognize, as held by this Court in *Interstate Com. Com.* v. *Atchison, T. & S. F. Ry. Co.*, 234 U. S. 294, that where team-track delivery is not provided under the line-haul rates shippers are entitled to an equivalent substitute service without additional charge. The Commission excuses the failure of the railroads to provide team tracks, but fails to recognize the obligation of the railroads under their line-haul rates to provide an equivalent substitute delivery service. In this discussion the Commission states that the railroads are under no obligation "to provide an excessive amount of terminal service", but not having determined the *quantum* of terminal service compensated for in the line-haul rates, or whether such line-haul rates include or do not include delivery, or whether such line-haul rates are adequate or inadequate to compensate for the delivery service performed, the Commission's statement as to "an excessive amount of terminal service" is without any support in the findings and is a pure assumption.

The Commission states that for the reasons just discussed the line-haul rates may be given only slight attention, saying "the propriety of the separate unloading charges may be determined without an extensive showing with respect to the reasonableness of the line-haul rates. The showing that the level of the rates to New York and Philadelphia is no higher than the rates to other consuming points where shippers unload or charges are assessed for unloading is of major importance in this respect." (286 I. C. C., p. 140) The complete failure of the Commission to give effect to the obligation of the railroads to make delivery under their

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line-haul rates is demonstrated by this minimizing of the importance of the line-haul rates and the reference to other communities where shippers unload or charges are assessed for unloading, completely disregarding the fact that unloading charges elsewhere are assessed only when an unloading service is requested by the shipper as a service *additional to delivery.* At such other communities the railroads provide team-track terminal facilities at which they make delivery to consignees *at their line-haul rates* and provide such consignees with an opportunity to unload their freight. At these other communities the railroads fully discharge their obligation to make delivery under their line-haul rates. But at New York the shipper in paying the line-haul rates pays for team-track delivery of his freight, or an equivalent delivery service, but does not receive it. The following language of the Commission, disapproving an extra railroad charge for spur-track delivery, sustained by this Court in *Interstate Com. Com.* v. *Atchison, T. & S. F. Ry. Co.,* 234 U. S. 294, applies equally well to the present case:

> "After a most exhaustive inquiry we can not find, taking this service as a whole in the same way that it is treated by the carriers, that the service is more expensive to the carrier than if all cars were given team-track delivery.
>
> "An additional charge may be made when an additional service is given. But the service here given is not additional to that for which the rate pays. If the shipper pays for team-track delivery and does not receive it, but asks instead and is given a sidetrack delivery which costs the carrier no more, he may not be compelled to pay an additional charge upon the assumption that he has received a terminal team-track service which has not been given. A carrier may not so construct its rates as to compel an extra charge for like service, and this, in our judgment, the defendants at Los Angeles have done." *Associated Jobbers of Los Angeles* v. *A., T. & S. F. Ry. Co.,* 18 I. C. C. 310, 318.

In sustaining the Commission's decision there, this Court said:

> "We cannot regard the act to regulate commerce as justifying an increased or extra charge for a substantially similar service . . ." (p. 314)

In the present case the Commission failed to determine the *quantum* of terminal service to which the shipper is entitled under the line-haul rates; nor did it determine that the delivery service performed at the pier stations, for which the extra charge is assessed, is in excess of the amount of service to which the shipper is entitled under the line-haul rate.

From the foregoing it will be seen that in the present case the Commission failed to perform its duty of determining where line-haul transportation ends. The Court is familiar with the many terminal cases in which such findings have been required and have been made.* The issues in the present case required similar determinations and findings by the Commission. In the absence of such determinations the Commission could not validly approve an additional charge for a service customarily paid for by the line-haul rate and which is and has long been paid for by the line-haul rates here involved.

The error of the majority in the court below rests upon crediting the Commission with having made determinations and findings which were not made. The majority opinion below rests on the erroneous views that the Commission "found that unloading is an additional service, wholly distinct from delivery"; "that this method of unloading saves the payment of switching charges by the consignee"; that "the Commission found that the line-haul service terminated when the cars reached the pier station"; and that

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* *E. g., United States* v. *American S. & T. Plate Co.*, 301 U. S. 402; *United States* v. *United States Smelting, R. & M. Co.*, 339 U. S. 186. See also *Atchison, T. & S. F. R. Co.* v. *United States*, 295 U. S. 193, in which an order of the Commission was held invalid because of the absence of essential findings "as to what constitutes complete delivery or where transportation ends." (p. 201)

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the Commission found "that unloading by the carrier is a desirable and justifiable accessorial service." No such determinations or findings were made by the Commission in its final report. A reading of the grounds of decision in the final report under the heading "General discussion and conclusions" discloses that none of these grounds is advanced by the Commission as the basis of its decision. Wholly different grounds are given. The error of the majority below grows out of the recital by the Court of certain findings made by a majority of the Commission in the Commission's original report (272 I. C. C. 648 at p. 662), which were abandoned by the Commission upon reconsideration and after two further hearings. The Commission's grounds of decision upon the "amplified record" are fully stated in its final report under the heading "General discussion and conclusions". (286 I. C. C., pp. 139-140) These findings and conclusions in the original report were reversed following the two further hearings and the charges originally approved were found unjust and unreasonable. We have earlier herein pointed out that the motions to affirm fall into the same error in placing primary reliance upon the conclusions in the Commission's original report which were abandoned and reversed by the Commission after further hearings.

CONCLUSION.

In its motion to affirm, the Commission states: "The Court has many times held, that 'the Commission's determination of the point in time and place at which a carrier's transportation service begins or ends is an administrative finding which, if supported by evidence, is conclusive on the court.'" We do not wish for any one to believe that we are attempting to contravene that principle. On the contrary, we are seeking to enforce it. We are asking this Court to compel the Commission to make a "determination of the point in time and place at which the carrier's transportation service" ends under its line-haul rates and a determination

of the services compensated for by such line-haul rates. In the cases reviewed by this Court in *United States* v. *United Smelting, R. & M. Co.*, 339 U. S. 186, and *United States* v. *American Sheet & Tin Plate Co.*, 301 U. S. 402, the Commission performed its required function and made such determinations. It failed to do so in the present case and its orders should be invalidated as was the order reviewed by this Court in *Atchison, T. & S. F. R. Co.* v. *United States*, 295 U. S. 193, which was unsupported by essential findings "as to what constitutes complete delivery or where transportation ends." (p. 201)

The questions involved in this appeal are important to the great citrus and vegetable producing areas of the United States and to the receivers and consumers of these important agricultural commodities. They are of equal importance to all shippers by railroad. The principles involved are applicable to all railroad rates on all traffic. If the Commission may approve extra charges for services compensated for by the line-haul rates, without determining the service covered by and compensated for by the line-haul rates, without determining whether an additional or merely substitute service is involved, and without requiring the railroads to sustain their statutory burden of proof under Section 15(7) of the Interstate Commerce Act, then any part of the transportation service heretofore and now comprehended within the line-haul rates may be made the subject of new, additional and duplicate charges, contrary to the policy of the Act.

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For the foregoing reasons, we submit that the questions presented by the appeal are substantial and that the motions to affirm should be denied.

Respectfully submitted,

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